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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 604

KURT RIETMANN,
Petitioner,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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In the Supreme Court
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No.

KURT RIETMANN,
Petitioner,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on September 13, 1957.

OPINIONS BELOW.

The decision of the District Court issuing a writ of habeas corpus and discharging the petitioner (T. 9-13)

is officially reported in 148 Fed. Sup. 556. The opinion of the United States Court of Appeals for the Ninth Circuit (T. 24-27) reversing the order of the District Court has not yet been officially reported. The latter opinion is printed in Appendix A hereto.

JURISDICTION.

The judgment of the Court of Appeals was filed and entered on September 13, 1957 (Appendix A hereto). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Can a returning resident alien be excluded from the United States under Section 212(a)(22) of the Immigration and Nationality Act of 1952 (8 USC Section 1182(a)(22)) because of having claimed exemption from military service in 1951, where, prior to the effective date of the 1952 Statute, he was entitled to reenter after a temporary absence notwithstanding such claim of exemption?

2. Does the Savings Clause in Section 405 of the Immigration and Nationality Act of 1952 (8 USC 1101 footnote) preserve the preexisting right of a lawfully resident alien who was ineligible to citizenship to return to the United States after a temporary absence?

STATUTES INVOLVED.

Immigration and Nationality Act of 1952 (8 U.S.C. 1101 et seq.):

"Section 101. (a) (8 U.S.C. 1101(19)

(19) The term 'ineligible to citizenship,' when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts."

"Section 212. (a) (8 U.S.C. 1182 (a))

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * * * *

(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants;"

Section 405(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. Sec. 1101 Footnote):

"Savings Clause

Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant or deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. * * *"

Section 13(c) of the Immigration Act of 1924 (8 U.S.C. Sec. 213(c)):

"No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant * * *."

Section 4 of the Immigration Act of 1924 (8 U.S.C. Sec. 204):

"When used in this Act the term 'nonquota immigrant' means——

* * * (b) an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad; * * *"

STATEMENT OF THE CASE.

Petitioner was admitted to the United States for permanent residence on July 1, 1949. In 1951 he requested and was granted relief from service in the Armed Forces of the United States as an alien. He thereby became ineligible to citizenship in the United States (Sec. 4(a) Selective Service Act of 1948, 62 Stat. 604-606) but under the statute then in force, he could nevertheless have left the United States temporarily and returned as a nonquota immigrant. (8 U.S.C. Sec. 213(c).)

On or about April 1, 1955 the Immigration and Naturalization Service issued to the petitioner a reentry permit and the petitioner made a temporary trip to Switzerland. He applied for readmission to the United States at New York, New York on September 27, 1955. He was denied admission to the United States under the provisions of Section 212(a)(22) of the 1952 Immigration Act (8 U.S.C. 1182(a)(22)) because of his ineligibility to citizenship. Pending outcome of the exclusion proceedings, he was paroled into the United States. His appeal from the exclusion order

was dismissed by the Board of Immigration Appeals February 13, 1956. (Ex. A.) A motion to reconsider was denied by the Board of Immigration Appeals June 13, 1956. (Ex. A.)

The District Court granted the petition for writ of habeas corpus, and by order dated November 8, 1956 (T. 13-14), issued the writ of habeas corpus and discharged the petitioner from the custody of the Immigration Service. In granting the writ, the District Court held that the petitioner had a status prior to the effective date of the 1952 Act which entitled him to reenter the United States after temporary visits abroad, if otherwise admissible, notwithstanding the fact that he was an alien ineligible to citizenship. The District Court held that this status or right to reenter the United States was saved by he provisions of the Savings Clause of the 1952 Act (Section 405(a); 8 U.S.C. 1101 Footnote) and that therefore the petitioner was not subject to exclusion at the time of his return to the United States in 1955.

The Court of Appeals reversed the decision of the District Court, conceding that petitioner had such a right to reenter prior to the 1952 Act, but holding that the Savings Clause did not preserve such status or right. (T. 24-27.)

REASONS FOR GRANTING THE WRIT.

This writ of certiorari is sought because the decision of the Court of Appeals is in conflict with decisions of this Court construing the provisions of the Savings Clause of the 1952 Act (Section 405(a)), and because the decision of the Court of Appeals involves an important question which should be settled by this Court pertaining to the administration of the Immigration and Nationality Laws of the United States, in that it would divest thousands of resident aliens who had at any time in the past claimed exemption from military service of their preexisting right to come back to the United States after a temporary absence abroad notwithstanding ineligibility to citizenship.

In *United States v. Menasche,* 348 U.S. 528, 75 S.Ct. 513, 99 LE 615, this Court stated:

> "The whole development of this Savings Clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well-established congressional policy *not to strip aliens of advantages gained under prior laws.* The consistent broadening of the savings provision, particularly in its general terminology, indicates that *this policy of preservation was intended to apply to matters both within and without the specific* contemplation of Congress." (Italics supplied.)

In *Shomberg v. United States,* 348 U.S. 540; 75 S.Ct. 500, 99 LE 624, this Court likewise held that the Savings Clause was all inclusive, and that, where Congress intended to override the Savings Clause because it deemed other considerations more com-

pelling than the preservation of a status quo, *it plainly said so in the Act.*

Both the *Shomberg* and *Menasche* cases, supra, involve questions arising under subdivision (b) of the Savings Clause which deals with naturalization proceedings. The case at bar involves subdivision (a) of the Savings Clause which deals with immigration and similar proceedings. However, this Court made it clear that the rationale of the *Shomberg* and *Menasche* cases, supra, applied with equal force to both subdivisions (a) and (b) of the Savings Clause when in *Lehmann v. United States ex rel. Carson*, 353 U.S. 685; 77 S.Ct. 1022; 1 LE 1122, and *Mulcahey v. Catalanotte*, 353 U.S. 692; 77 S.Ct. 1025; 1 LE 1127, the Court considered the effect of Section 405(a) on deportation proceedings and held that the Savings Clause did not apply to situations *otherwise specifically provided for* in the 1952 Act, and that Section 241(d) of the 1952 Act (8 U.S.C. 1251(d)) specifically provided for deportation under the factual circumstances existing in the cases then under consideration by the Court.

In the case at bar, the Court of Appeals embraces the definition of ineligible to citizenship found in Section 101(a)(19) (8 U.S.C. 1101(19)) within the provisions of Section 212(a)(22) (8 U.S.C. 1182(a)(22), and holds that in enacting Section 212(a)(22), Congress was "legislating retrospectively, as it may do."

Because "ineligible to citizenship" is defined as including an individual who is or was at any time permanently disbarred from becoming a citizen, the Court of Appeals concluded that the provisions of the

1952 Act considered by this Court in the *Carson* and *Catalanotte* cases, supra, do not appear to carry any more definitely retroactive language than that contained in Sections 212(a)(22) and 101(a)(19). The fallacy of the Court of Appeals' reasoning lies in regarding the language "is or was at any time" in the definition in Section 101(a)(19) of ineligibility to citizenship as denoting an intention to apply the excluding provisions of Section 212(a)(22) without regard to the Savings Clause in Section 405.

It is conceded that the petitioner is "ineligible to citizenship" under the definition in Section 101(a)(19) as well as under the provisions of the prior Immigration Laws, but nowhere in the *excluding* provisions contained in Section 212 is there any language which *specifically provides* that a lawfully permanent resident alien ineligible to citizenship who had a right under the prior statute to reenter the United States after temporary visits abroad, is divested of such right under the Immigration Act of 1952. Section 212 does not contain a retroactive paragraph, such as is contained in Section 241(d), but in fact, Section 212 contains the following specific excepting language:

> "*Except as otherwise provided in this Act*, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States." (Italics supplied.)

We think it is clear that the phrase, "Except as otherwise provided in this Act" is a definite expression of Congressional intent that the Savings Clause, when applicable, shall protect an alien from the effect

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of Section 212. As we interpret Section 212(a)(22), it bars the admission of an alien into the United States if the alien *at any time* caused himself to become ineligible to citizenship unless the alien, despite such ineligibility to citizenship, had a right to return to resume residence after a temporary absence from the United States.

Where either the status of permanent resident or the status of ineligibility to citizenship arose after the effective date of the 1952 Act, of course, the Savings Clause would not apply.

The Court of Appeals for the Second Circuit in *Paris v. Shaughnessy,* 247 Fed. 2d 1, has reached the same conclusion as the Court below. We submit that the Court in the *Paris* case, supra, fell into the same error as the Court of Appeals in the case at bar.

The decision of the Court of Appeals would divest thousands of resident aliens of the right to depart and reenter the United States if they had ever claimed exemption from military service, even though they were not previously subject to such disability.

The decision of this Court in *Kwong Hai Chew v. Colding,* 344 U.S. 590; 73 S.Ct. 472; 97 LE 576, makes it clear that a resident alien returning from a temporary visit outside the United States may have rights different from those of an alien who is seeking entry into the United States for the first time. In the case at bar, the Court of Appeals recognizes that a returning resident alien under the prior Immigration Law had a right to reenter the United States notwithstanding in-

eligibility to citizenship. Clearly that right was saved by the provisions of the Savings Clause unless there was some specific provision in the 1952 Act which deprived such aliens of the right they enjoyed under the prior law. There is no such provision in the 1952 Act which would indicate an intent to override the provisions of the Savings Clause.

If the decision of the Court of Appeals is permitted to stand, permanent resident aliens who claimed exemption from military service prior to 1952 cannot step outside the United States without relinquishing their right to come back, which right they enjoyed under the prior Act. They will face permanent banishment from this country and obviously will be *stripped of an advantage* gained under the prior immigration laws. We submit that if such a harsh consequence was intended by the Congress, there would have been a specific provision in the 1952 Act depriving such aliens of the benefits of the Savings Clause.

The question here is simply whether Congress intended to apply Section 212(a)(22) without regard to the Savings Clause. This Court has previously indicated that language in an immigration statute restricting aliens' rights should be given the narrowest of several possible meanings. (*Fong Haw Tan v. Phelan*, 333 U.S. 6; 28 S.Ct. 374; 92 LE 433.) We submit that there is no language in the 1952 Act sufficient to evidence a clear intention to deprive such resident aliens of the benefits of the Savings Clause.

CONCLUSION.

In view of the conflict between prior decisions of this Court and the decision of the Court of Appeals in the case at bar and because of the far-reaching effect of the decision of the Court of Appeals, we submit that certiorari should be entertained.

For the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.

Dated, San Francisco, California,
November 6, 1957.

JOSEPH S. HERTOGS,
Attorney for Petitioner.

ARTHUR J. PHELAN,
MILTON T. SIMMONS,
Of Counsel.

(Appendix Follows.)

Appendix

United States Court of Appeals for the Ninth Circuit

Bruce G. Barber, District Director, Immigration and Naturalization Service, Appellant, vs. Kurt Rietmann, Appellee.	No. 15,394 Sept. 13, 1957

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: ORR, BARNES, and HAMLEY, Circuit Judges

ORR, Circuit Judge:

Rietmann, hereafter referred to as Petitioner, a citizen of Switzerland, was on the first day of July, 1949, admitted as a permanent resident of the United States. On March 19, 1951, he requested and was granted relief from service in the Armed Forces of the United States under Section 4(a) of the Selective Service Act of 1948, 62 Stat. 604, 605-606. Having claimed and been granted exemption from service in

the Armed Forces, Petitioner was thereby debarred from becoming a citizen of the United States.

Thereafter, Petitioner decided to take a trip to Switzerland and on or about April 1, 1955, was issued a re-entry permit by the Immigration and Naturalization Service. He took the trip and attempted to re-enter the United States on September 27, 1955. He was denied admittance under Section 212(a)(22) of the 1952 Immigration and Nationality Act, 8 U.S.C.A. § 1182(a)(22) (1952), as an alien permanently ineligible to become a citizen under Section 315(a) of said Act, 8 U.S.C.A. § 1426(a) (1952). Petitioner is now in the United States under parole.

On August 3, 1956, a writ of Habeas Corpus was applied for by Petitioner. On November 8, 1956, the District Court granted the petition and issued the writ. 148 F.Supp. 556.

In granting the writ the District Court held that Petitioner was taken out of the provisions of the 1952 Act by reason of the Savings Clause contained in said Act, which, insofar as it is pertinent here, reads:

> "Section 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect . . . any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or mat-

ters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect." 8 U.S.C.A. § 1101 Note (1952).

At the time of the enactment of the 1952 statute, Petitioner had acquired a *status* under the 1924 statute which would have permitted him to make a temporary visit abroad and to have thereafter re-entered the United States as a non-quota immigrant, notwithstanding he was ineligible to become a citizen of the United States. The trip taken by Petitioner was in 1955. His attempt to re-enter was in the same year. The question for solution is: Was the status given him by the 1924 Act preserved by the Savings Clause of the 1952 Act? It was, unless otherwise provided in the 1952 Act. We turn to a consideration of the applicable provisions of the 1952 Act.

Section 212(a)(22), 8 U.S.C.A. § 1182(a)(22) (1952), provides:

> "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: * * *
>
> "(22) Aliens who are ineligible to citizenship . . ."

In construing the provisions of the 1952 Act, Section 212(a)(22) must be read in connection with Section 101(a)(19), 8 U.S.C.A. § 1101(a)(19), which defines the phrase "ineligible to citizenship" when used in the Act in reference to any individual to mean

> "... notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under Section 4(a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts."

So when Section 212(a)(22) excludes aliens ineligible for citizenship, it by definition excludes an individual *who is, or was at any time, permanently debarred from becoming a citizen of the United States.* We think this provision definitely makes the exclusionary provision of the 1952 Act retroactive.

There is no apparent reason to include the phrase "or was at any time" and the reference to the 1940 Draft Act and its successor, the 1948 Act, unless the Congress was "legislating retrospectively, as it may do. . . ." *Mulcahey v. Catalanotte,* 353 U.S. 692, 694 (1957).

Certain provisions of the 1952 Act, which the Supreme Court of the United States held to be retroactive in the cases of *Lehmann v. United States ex rel. Carson,* 353 U.S. 685 (1957) and *Mulcahey v. Catalanotte, supra,* do not appear to carry any more definitely retroactive language than that contained in

Sections 212(a)(22) and 101(a)(19), although the deportation provisions are more repetitious.[1]

Petitioner argues that the general preface to the exclusion section, viz., "Except as otherwise provided in this Act," reaches over to the Savings Clause and overrides any provision of retroactivity as relates to petitioner. We do not agree. The general preface has no effect upon the express provision providing for the exclusion of Petitioner because of his ineligibility to become a citizen.

The Second Circuit in the case of *Paris v. Shaughnessy*, ... F.2d ....., decided July 2, 1957, reached the same conclusion we do here: that the Savings Clause of the 1952 Act does not apply to the re-entry of a person ineligible to citizenship because it is otherwise provided for in the Act.

Reversed.

(Endorsed:) Opinion. Filed Sept. 13, 1957.

Paul P. O'Brien, Clerk.

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[1]That the use of the definition contained in section 101(a)(19) was intended to apply to section 212(a)(22) is apparent from the reference in the latter section to persons leaving the country to avoid military service, and from the fact that the words "ineligible to citizenship" appear elsewhere in only minor provisions of the Act.

United States Court of Appeals for the Ninth Circuit

Bruce G. Barber, District Director, Immigration and Naturalization Service, Appellant, vs. Kurt Rietmann, Appellee.	No. 15,394

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is reversed.

(Endorsed:) Judgment. Filed and entered. Sept. 13, 1957.

Paul P. O'Brien, Clerk.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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service in 1951, thereby debarring himself from becoming a citizen. Thereafter, in 1955, he left this country for a short period. The question presented is whether, on his return, he was properly excluded as inadmissible under the Immigration and Nationality Act of 1952.

STATUTES INVOLVED

Section 4 (a) of the Selective Service Act of 1948, 62 Stat. 604, 605:

> (a) Except as otherwise provided in this title, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and twenty-six at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to section 3 of this title, shall be liable for training and service in the armed forces of the United States. Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

* * * * *

Section 315 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 242, 8 U. S. C. 1426 (a):

> (a) Notwithstanding the provisions of section 405 (b), any alien who applies or has ap-

plied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

Section 212 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 184, 8 U. S. C. 11[illegible] (a):

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; * * *

* * * * *

Section 101 (a) (19) of the Immigration and Nationality Act, 66 Stat. 169, 8 U. S. C. 1101 (a) (19):

(19) The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3 (a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4 (a) of the Selective Service Act of 1948, as amended (62 Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

Section 405 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U. S. C. 1101 note:

> SEC. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statuses, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. * * *

Section 13 (c) of the Immigration Act of 1924, 43 Stat. 162, 8 U. S. C. (1946 ed.) 213 (c) [1] provided:

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[1] This and the following Section 4 were repealed on June 27, 1952, by the Immigration and Nationality Act. It is under these two sections that petitioner claims to have acquired a status which was preserved by the savings clause, Section 405 (a), of the 1952 Act, *supra*.

> No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant * * *.

Section 4 of said Act, 43 Stat. 155, 8 U. S. C. (1946 ed.) 204, defining non-quota immigrant, provided:

> When used in this Act the term "non-quota immigrant" means—
>
> * * * * *
>
> (b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;
>
> * * * * *

STATEMENT

The material facts in this case, which are not in dispute, are alleged in the petition for a writ of habeas corpus and admitted in the respondent's return (R. 3–8). Petitioner is a citizen of Switzerland, who first entered the United States as a permanent resident on July 1, 1949. On March 19, 1951, he applied for and was granted relief from military service under Section 4 (a) of the Selective Service Act of 1948, 62 Stat. 604, 605, *supra*, p. 2, which provided that a resident alien might apply for exemption from military service, but would thereafter be debarred from becoming a citizen. At the time petitioner sought and obtained his exemption, such action on his part did not prevent him from leaving the country temporarily and returning as a nonimmigrant without being subject to quota restrictions (see Section 13 (c) of the 1924 Act, *supra*, pp. 4–5).

In 1955, petitioner wished to make a trip to Switzerland; he applied for and received a reentry permit from the Immigration and Naturalization Service. He returned from his trip after about four months

abroad, but was held for hearing by the immigration authorities at the port of New York. He was released on parole and allowed to proceed to San Francisco, where a hearing was conducted by a Special Inquiry Officer. At this proceeding, it was found that petitioner should be excluded under Section 212 (a) (22) of the Immigration and Nationality Act of 1952, *supra*, p. 3, as an alien permanently ineligible to become a citizen of the United States. This decision was upheld by the Board of Immigration Appeals.

Petitioner thereupon sought and obtained a writ of habeas corpus from the District Court and was discharged from the custody of the Immigration Service (R. 9–13). The District Court's ruling was reversed by the Court of Appeals (Pet. App. i–v).

ARGUMENT

Both at the time petitioner left the United States in 1955 and when he sought to return, Section 212 (a) (22) of the Immigration and Nationality Act of 1952 provided that there should be excluded from admission to the United States aliens who are "ineligible to citizenship". In contrast to the 1924 Act which excepted from a similar provision nonquota immigrants, a class which included resident aliens like petitioner (see *supra*, pp. 4–5), the present statute excepts only nonimmigrants, a class limited to aliens entering for certain special purposes set forth in Section 101 (a) (15). Petitioner is an alien who is concededly ineligible for citizenship. Under the terms of Section 212 (a) (22), he thus had to be excluded

when he sought to return. Both the court below and the Second Circuit have correctly so held. See *Paris* v. *Shaughnessy*, 247 F. 2d 1 (C. A. 2), in which a petition for a writ of certiorari was filed on December 11, 1957, No. 658, this Term.

1. The 1924 Act permitted resident aliens to return to the United States even though they were ineligible to citizenship, but by the time petitioner left the United States that law had been repealed and the new provisions of the 1952 Act were in effect. We very much doubt the validity of the assumption made by the court below in this case and the Second Circuit in the *Paris* case that the mere fact that an alien was permitted to enter under an exception in the 1924 Act gave him a right or status of non-excludibility which was, in any sense, within the contemplation of the general savings clause, Section 405 (a) of the 1952 Act, *supra*, particularly in relation to a departure which occurred after the 1952 Act had become effective. But certainly, as both courts have held, if an alien in petitioner's position ever had such a status, Section 212 (a) (22)—taken together with Section 101 (a) (19), *supra*, p. 3, constitutes a specific provision which overrides preservation of that status.[2] In that respect, this case is controlled by *Lehmann* v. *United States ex rel. Carson*, 353 U. S. 685 and *Mulcahey* v. *Catalanotte*, 353 U. S. 692, where

[2] The opinion of the Ninth Circuit below spells out the textual support for this conclusion—reading Section 101 (a) (19) (with its retrospective reference to "an individual who is, or was at any time, permanently debarred from becoming a citizen") together with Section 212 (a) (22). See Pet. App. iii–iv.

the aliens, who had not been deportable before the effective date of the 1952 Act, contended that they had a status of non-deportability which was saved by the general savings clause. This Court held that, if there was any such "status", Section 241 (d) of the 1952 Act was a section which "otherwise specifically provided" so as to render the general savings clause inapplicable to the grounds for deportation set forth in the 1952 Act. Similarly, Section 212 (a)(22) is an "otherwise specifically provided" clause which renders the general savings clause inapplicable.

2. This conclusion is pointed up by the legislative history. As the House Judiciary Committee, speaking of Section 212 (a), stressed in its Report accompanying the bill as finally adopted (H. Rep. 1365, 82d Cong., 2d Sess., p. 45):

> The bill strengthens the provisions relating to excludable classes, to provide added assurance that undesirable aliens will not gain admission to the United States.

See also S. Rep. 1137, 82d Cong., 2d Sess., p. 8. More particularly, in its analysis of S. 3455, the Immigration and Naturalization Service brought to the attention of Congress the fact that the proposed legislation, unlike the 1924 Act, would have the effect of excluding from admission nonquota immigrants who were ineligible for citizenship. Speaking of Section 212 (a)(22), as then drafted, the Service said (p. 212-18):

> This clause bars the immigration of aliens who are ineligible to citizenship *except those entering as nonimmigrants under section 101 (a) (15) (E) of the bill.* [Emphasis added.]

In fact, as originally drafted, the only nonimmigrants excluded from the operation of Section 212 (a) (22) were "treaty traders". See the Immigration and Naturalization Service Analysis, *supra*, p. 212–19. And although the later drafts and the bill as finally enacted enlarged the exception from Section 212 (a) (22) to include all nonimmigrants (see the Immigration and Naturalization Service Analysis of S. 716, pp. 212–17, 212–18), no like exception was ever made for a "nonquota immigrant".[3] Hence, since petitioner is admittedly not a nonimmigrant, he was not intended to be excepted from the coverage of Section 212 (a) (22).[4]

The Immigration and Naturalization Service spelled out the effect of Section 212 (a) (22) even more directly in its analysis of Section 211 (c) of S. 3455[5] (Analysis, *supra*, pp. 211–2—211–4):

> This subsection provides that no alien ineligible to citizenship shall be granted a visa or

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[3] Under the 1924 Act, unlike the 1952 legislation, there was no group of aliens defined as nonimmigrants. The only two classes delineated in the earlier Act were immigrants (Section 3) and nonquota immigrants (Section 4). However, Section 3 excluded from the definition of "immigrant" certain classes of aliens of the same kind as those classes defined as nonimmigrants under Section 101 (a) (15) of the 1952 Act.

[4] "The present law, and the instant bill, provide that all applicants for admission who do not qualify as nonimmigrants are to be regarded as applicants for admission as immigrants. The immigrant class is further divided into two categories: (1) quota immigrants who are subject to quota limitations, and (2) nonquota immigrants who are not subject to the numerical quota restriction." (H. Rep. 1365, 82d Cong., 2d Sess., p. 37.)

[5] This subsection had provided: "No alien ineligible to citizenship shall be granted a visa or be admitted to the United States,

be admitted to the United States, except as a nonimmigrant under section 101 (a) (15) (E), which relates to treaty traders and their spouses and children. The subsection will replace section 13 (c) of the 1924 Act, but is greatly different in its effect. Under the 1924 Act persons ineligible to citizenship include persons ineligible on account of race. That will no longer be a ground for ineligibility to citizenship under this bill. The persons who fall within that classification under the bill are those defined in section 101 (a) (19). They are persons who are ineligible to citizenship because of various acts which have resulted in their deserting or avoiding military service. It has apparently been considered desirable in this bill to restrict the circumstances under which aliens ineligible to citizenship may be admitted to this country. Subsection (c) itself contains authority only for their admission as treaty traders. Section 212 (d) (3) prohibits the exercise of discretion to permit the admission of persons covered by section 212 (a) (22). However, section 212 (c) will apparently permit the Commissioner to readmit, in his discretion, aliens covered by section 212 (a) (22), who have the status of lawful permanent residents who proceed abroad temporarily, and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years. In addition, aliens who are ineligible to citizenship may be excluded and paroled into the United States for medical treatment under section 212 (d) (5).

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except as a nonimmigrant under section 101 (a) (15) (E)." Section 211 (c) of the Act as finally adopted did not contain this provision.

> The circumstances under which aliens ineligible to citizenship may be admitted to this country after having deserted or avoided service in our armed forces are primarily matters of legislative policy. Nevertheless, it should be observed that the result of these provisions will be that some such persons who may have been temporarily in this country, and who may have exercised a lawful right to avoid such military service will be thereafter forever excluded from entering this country under any circumstances except as treaty traders or for medical treatment. On the other hand, draft evaders who are lawful permanent residents of the United States and who, it would seem, should respond to a call for duty in the armed forces may, if they have been here for as long as seven years, leave the country and be readmitted within the discretion of the Commissioner. It is suggested that this result be specifically brought to the attention of the Congress as it may or may not have been intended that such a situation should obtain. If it is actually the intention that returning legal residents who are ineligible to citizenship shall be admitted in the discretion of the Commissioner, it is suggested that the period at the end of present subsection (c) [of section 211] be changed to a comma and the following be added "or, within the discretion of the Commissioner, under the provisions of section 212 (c)."

We must assume that Congress was aware of this specific comment by the Service indicating that returning aliens already ineligible to citizenship would be excludable. Congress thereafter clarified the provisions relating to the discretionary authority of the

Attorney General to readmit nonquota immigrants under certain conditions.[6] It also amended Section 212 (a) (22) to exclude all nonimmigrants from its coverage. By not extending this exception to nonquota immigrants as well, Congress seems to us to have indicated its intent to give effect to the interpretation placed on Section 212 (a) (22) by the Service.

Finally, it should be pointed out that, as originally drafted, the term "ineligible to citizenship" was prospective in operation. As pointed out by the Service in its analysis (p. 101(a)(19)-1):

> As drafted, this definition appears to be prospective only. It does not clearly appear to include certain persons now within the meaning of the definition of the similar term found in section 28 (c) of the Immigration Act of 1924. * * * [I]t seems doubtful that the definition in this bill would apply to any person who may be debarred from becoming a citizen under section 4 (a) of the Selective Service Act of 1948 (U. S. C., Title 50, App., 454).

For the specific purpose of making sure that the definition covered those men *already* debarred from citizenship, the Service recommended the broadened definition of "ineligible for citizenship"—expressly including those debarred from citizenship under the 1940 and 1948 military service acts—which appears in the final legislation (Section 101 (a) (19), *supra*, p. 3).

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[6] Section 211 (c) of S. 3455 was completely revised, and Section 212 (d) (3), as well as Section 212 (c), were substantially retained. Petitioner is not eligible for relief under Section 212 (c) (see footnote 7, *infra*).

In sum, the purpose of Section 212 (a) (22) of the 1952 Act was to change the 1924 Act by excluding nonquota immigrants, like petitioner, who were already ineligible for citizenship under the military service acts when the 1952 Act was adopted. In view of this clear Congressional intent, petitioner cannot be said to be protected by the savings clause. The determination of whether a particular section comes within the "otherwise specifically provided" part of a general savings clause requires not any particular form of language but only a clear expression of Congressional purpose. Cf. *Lee You Fee* v. *Dulles*, this Term, No. 58, decided November 18, 1957.[7]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[7] Since petitioner did not have a domicile in this country of seven years when he returned in 1955 (see *supra*, pp. 5–6), he is apparently not eligible for the relief which can be accorded, in the Attorney General's discretion, under Section 212 (c) of the 1952 Act.

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